No. 2663

United States
Circuit Court of Appeals
For the Ninth Circuit

ARIZONA COPPER ESTATE,

Appellant,

against

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, JR.,

Appellees.

Brief for Appellant.

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Index.

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BRIEF FOR APPELLANT

Statement of the Case

This case turns on the legal effect of an instrument in the conventional mortgage form, executed by the appellant to Messrs. Mathews and Syme (P. R. 77 to 80), simultaneously with their deed to it (P. R. 72 to 75).

The appellant contends that the instrument in question is the ordinary purchase money mortgage and created only a lien. The appellees contend, and the Court below held, that it should be construed with the deed to constitute a conditional sale, under which the appellant acquired no title to the property, because of the default in payment at maturity of the notes mentioned in the instrument.

The appellees brought this action to quiet title and not to reform any instrument (P. R. 31). There is no allegation nor finding herein of mistake or fraud in the transaction, nor of any agreement contrary to the executed instruments; and the decree is based upon the instruments as executed. The

Court below permitted the appellees to introduce testimony to prove the intended or expected legal effect of the deed and purchase money mortgage, but ignored such testimony in the findings.

The Arizona Copper Estate was duly incorporated under the laws of Arizona (P. R. 57, 58). The appellees have abandoned their allegations as to the non-incorporation of the appellant corporation.

On August 3, 1899, Messrs. Alex. F. Mathews and S. A. M. Syme purported to convey to The Arizona Copper Estate, the appellant, a tract of Arizona land known as Baca Float No. 3, containing about 99,000 acres of land (P. R. 72 to 74), representing that they had a good title (P. R. 81). At the time of the conveyance, the grantors had one of four conflicting chains of title to the Float; and there had been two locations of it, neither of which was then recognized by the United States.

On the same date and in the same transaction, The Arizona Copper Estate mortgaged the same premises to Messrs. Mathews and Syme, to secure $100,000 in notes executed by it to various parties, including the mortgagees. This instrument was prepared by Captain Mathews (an experienced lawyer, banker and real estate operator and one of the mortgagees) on a *printed mortgage form* (P. R. 40 to 42), *marked "Mortgage without Bond" at the top and "Mortgage" on the cover.*

The mortgage was completed in the customary way; and for the sake of clearness, the appurtenance and *habendum* clauses were repeated after the description. The instrument bears the war stamps of a mortgage and it was promptly recorded as a mortgage. In the year 1901, Capt. Mathews and C. H. Syme (the son of the other mortgagee and also a lawyer) referred to it as a mortgage (P. R. 58, 59).

Capt. Mathews read over the mortgage after it was executed (P. R. 43), and then turned it over to Col. Syme for record-

ing. Subsequently it alternated in the possession of the mortgagees until 1906, when it was turned over to the appellees (P. R. 42, 43).

Shortly prior to August, 1899, Senator Dorsey of the Copper Estate had an option or contract of sale from Col. Syme, which the latter rescinded or repudiated for reasons which he alone understands (P. R. 41). In August, 1899, Col. Syme wished to give another option (P. R. 32); but Senator Dorsey of the Copper Estate, after his experience with the former option, "wanted a deed" (P. R. 32).

In the transaction of August 3, 1899, $5,000 cash was paid (P. R. 41); and this Col. Syme divided among Capt. Mathews, Col. Boyce (the broker) and himself (P. R. 77 to 81). The notes specified in the mortgage were distributed among Capt. Mathews as Trustee for Miss Eldredge, Capt. Mathews personally, Col. Boyce and Col. Syme (P. R. 43, 44).

By a decision dated July 25, 1899, and reported in 29 L. D. 44, the Secretary of the Interior changed the location of the Float; and on August 3, 1899, this was known to Messrs. Mathews and Syme, but apparently not to Senator Dorsey who acted for the Copper Estate (P. R. 41, 83). Capt. Mathews and Mr. C. H. Syme admitted in 1901 that the default in the notes was "largely occasioned" by that decision (P. R. 59).

Shortly after the transaction of August 3, 1899, Senator Dorsey of the Copper Estate went to Washington to investigate the condition of the title to the Float. After consulting fully with the attorneys of the Land Department, he found that the title was so complicated that nothing could be done with it in a commercial way (P. R. 83).

Between 1899 and 1906, nothing was done by Messrs. Mathews and Syme except to turn over the papers to one or two sets of lawyers (P. R. 43 to 48), and to petition the Sec-

retary of the Interior to reverse the decision of July 25, 1899 (P. R. 58, 59).

In 1906, after the mortgage and notes were barred by the Arizona statutes of limitation, the appellees, Messrs. Watts and Davis, both lawyers, came into the situation as attorneys for Mathews and Syme. In 1907, after the death of Captain Mathews, Colonel Syme and the legal representatives of Captain Mathews executed a trust instrument purporting to transfer the property to Messrs. Watts and Davis as Trustees, with power to sell, convey, lease, mortgage or dispose of it (P. R. 67 to 71). This instrument was not recorded until March 20, 1914. Messrs. Watts and Davis represent Col. Syme and the Mathews Estate and have ever since 1907 (P. R. 45, 60).

On June 22, 1914, the United States Supreme Court decided that the legal title to the specific tract of land now known as Baca Float No. 3, located in 1863 with specific boundaries, passed from the United States on April 9, 1864, over fifty years prior to the decision (*Lane v. Watts*, 234 U. S. 525; 235 U. S. 17). In that action, attorneys representing two diverse titles from the Baca heirs joined as attorneys for the successful parties; and the deed and purchase money mortgage herein appear on page 337 of the record in that case. In that record may be found also the chain of title of the appellees herein, and still another absolutely adverse chain. None of the questions herein was involved or passed upon in that case.

On June 23, 1914, the day following the announcement of the decision by the United States Supreme Court, Messrs. Watts and Davis filed their Bill herein. Shortly prior to the filing of the Bill, the appellees had quietly taken actual possession of the tract (P. R. 51), although there was no technical right of possession against the United States until the filing of the plat of survey on December 14, 1914 (P. R. 49),

notwithstanding the passage of full legal title in 1864 (*Lane v. Watts*, 235 U. S. 17).

The Bill prayed that the transaction of August 3, 1899, be treated as a nullity, for the reason that the Copper Estate was supposedly never incorporated, or in any event because the deed and purchase money mortgage were said to constitute a conditional sale in which the title automatically and absolutely reverted to Messrs. Mathews and Syme on the non-payment of the notes. The Bill is also susceptible of being treated as one for the foreclosure of a mortgage (Bill, Sections 11, 29). There were two amendments to the Bill presenting other legal theories of the transaction.

The Copper Estate in its amended answer contended that the transaction of August 3, 1899, was the ordinary deed and purchase money mortgage transaction and pleaded the Arizona statutes of limitation against the notes and the mortgage, as well as against all relief prayed for by the plaintiffs.

Subsequent to the commencement of the action, the Copper Estate conveyed its title to a third party and the deed was promptly recorded. This was set up in its amended answer and was stated by counsel at the trial. With the permission of the Copper Estate (P. R. 36, 37, 95, 96), both express and implied, the action was defended by the third party in its name, in accordance with the well recognized rule that one who *pendente lite* acquires the title of a *defendant* in a real estate action may defend and appeal in the name of his grantor (*Ex Parte R. R. Co.*, 95 U. S. 221, 226; *Ecaubert v. Appleton*, 67 Fed. 917, 923; *Hickox v. Elliott*, 22 Fed. 13, 18).

We offered to have the grantee and her *cestui que* trustent (who also claims under another chain of title) added as parties defendant; but the appellees objected, although they had at one time considered the advisability of making the grantee of the Copper Estate a party defendant (P. R. 54 to 57).

No part of the note indebtedness was ever paid; no suit was ever brought to foreclose the mortgage or to collect the notes (P. R. 47, 61). There was no foreclosure under any assumed power of sale (P. R. 47, 61).

It was stipulated that no question of community property is involved (P. R. 47). Messrs. Mathews and Syme resided, and were born and married, in jurisdictions where the dower system has always been in force (P. R. 28, 29); consequently, under all the authorities, their respective wives had no community rights in the property.

At the trial herein, the appellees, against the objection and exception of the appellant, introduced the testimony of Col. Syme (who was then seventy-seven years of age) as to the understanding of the parties, sixteen years prior thereto, of the legal consequences of a default in the notes mentioned in the purchase money mortgage. That testimony need not be repeated here, as it was simply an inexperienced layman's conception of how a purchase money mortgagee gets back his title. Col. Syme frankly said that he did not know the difference between a deed and a mortgage; and that, according to his understanding, the mortgage expresses the agreement, as it states (in the defeasance clause) that if the notes are not paid, the property shall revert to Capt. Mathews and himself (P. R. 48).

Col. Syme considered the mortgage to be a deed of reconveyance (P. R. 47) and the whole transaction only an option. The witness admitted that the Copper Estate insisted upon receiving a deed, while the grantors at first wished to give only an option (P. R. 32).

The appellees also introduced, without objection, a statement obtained by Mr. Davis from Senator Dorsey as to his "best recollection" in 1914, shortly before the commencement of this suit and the announcement of the decision of the United States Supreme Court in the Baca Float case (P. R.

81 to 83). The repetition in the statement of the defeasance clause of the mortgage shows actually a purchase money mortgage transaction, and the statement as a whole clearly indicates such a transaction and not a conditional sale. His "understanding" of the legal effect of the papers, although vague and confused, is simply an erroneous conclusion of law and immaterial. His "understanding" at that time that the Copper Estate had no title was premised entirely on his assumption that it was never incorporated; the appellees' testimony (P. R. 49 to 51) and the charter of the corporation (P. R. 57, 58) prove the contrary and destroy his premise. His reference to the lack of "indebtedness" is explained by his succeeding sentence, that the Copper Estate was incorporated especially for the transaction and was expected to have no other assets.

Conclusive evidence that the disputed instrument was intended to be a mortgage is shown in the preparation of it in the presence of all of the parties by Capt. Mathews, the only lawyer among them, on an ordinary printed mortgage blank, which was headed and backed as a "Mortgage," in the stamping of it as a mortgage and in its record as such; and especially in the instrument itself, with its defeasance clause, its covenant to pay the note indebtedness and the provision for a foreclosure sale on default.

Absolute proof that the mortgagees knew that they had received only a mortgage is found in a formal declaration in 1901 of two lawyers—Capt. Mathews, one of the mortgagees, who drew the papers, and C. H. Syme, the son of the other mortgagee and the attorney for both of them (P. R. 58 to 60).

The lower Court delivered no opinion, but signed a combination of findings and decree to the effect that the deed and the purchase money mortgage are to be construed as one in-

strument and constitute a conditional sale of the land, by which the appellant neither acquired nor has any right, title, interest or estate because of the default in the payment of the notes. The affirmance of the doctrine of the decree will cloud innumerable titles throughout the jurisdiction of this Court.

We contend that under the uniform decisions of the courts in the Western states, and under the Arizona statute which was adopted *verbatim* from California, the mortgage was only a lien and passed no title, before or after default. We also contend that the mortgage and the notes secured thereby are now barred by the Arizona statutes of limitation.

Assignments of Error

FIRST: The Court below erred in finding and decreeing that the deed of conveyance from Alexander F. Mathews and Samuel A. M. Syme to Arizona Copper Estate and the instrument of reconveyance executed by Arizona Copper Estate to said Mathews and Syme, recorded in the Recorder's office of Pima County, Arizona, in Book 15 of Mortgages, page 60, and hereinafter referred to as the "reconveyance," are to be construed as one instrument and constitute a conditional sale of the land referred to therein.

SECOND: The Court below erred in not finding and decreeing that said reconveyance was a mortgage.

THIRD: The Court below erred in admitting and considering any testimony or evidence as to the meaning, construction or contemplated legal effect of the said reconveyance, or the intention of the parties with reference to said reconveyance or the $100,000 of notes recited therein.

FOURTH: The Court below erred in admitting and considering the testimony of Samuel A. M. Syme to the effect

that it was the understanding and intention of the parties to said reconveyance that in case the $100,000 of notes recited therein were not paid according to their tenor and effect, the land described in said reconveyance should be the property of the grantees therein; that the sale was not to be deemed made unless and until said notes and all of them were paid, and that in case said notes were not paid they, as well as said deed and reconveyance, were to be void.

FIFTH: The Court below erred in finding and decreeing that said Arizona Copper Estate acquired no interest or estate in the land described in the decree under said deed and reconveyance, and that they constitute a cloud on plaintiff's title.

SIXTH: The Court below erred in finding and decreeing that the full legal title to said land was in the appellees, and barring the appellant and its successors in interest from asserting any interest or title under said deed and reconveyance.

SEVENTH: The Court below erred in not finding and decreeing that said reconveyance and the notes recited therein were barred by the Arizona Statutes of Limitation.

EIGHTH: The Court below erred in not finding and decreeing that all relief of the plaintiffs was barred by the Arizona Statutes of Limitation.

NINTH: The Court below erred in not dismissing the bill on the merits.

Brief of Argument

POINTS

I. The instrument from the Arizona Copper Estate to Mathews and Syme is an ordinary real estate mortgage.

II. The mortgage created only a lien for a purchase money debt and did not operate as a conveyance or conditional sale.

III. Parol evidence was not admissible to show the intended or expected legal effect of the mortgage and cannot be considered by the Court, even if received without objection.

IV. There is neither allegation, proof nor finding of mistake.

V. Analysis of evidence.

VI. All relief to plaintiffs is barred by limitations and laches.

VII. There was no power of extra-judicial sale nor any attempt to exercise such a power.

VIII. Neither Mrs. Mathews nor Mrs. Syme had community rights.

IX. The appellant was properly incorporated and its corporate existence cannot be attacked by the appellees.

I

The instrument from the Arizona Copper Estate to Mathews and Syme is an ordinary real estate mortgage.

Form and Preparation of Paper

The instrument at bar, prepared and executed in New York City on a *New York printed mortgage blank,* followed the New York statutory form of mortgage *(New York L. 1890 ch. 475, Sec. 6; Sec. 223 of Real Property Law of 1896).* A form of "Mortgage without bond" was used because a number of negotiable notes, of varying amounts and maturities, were intended to be secured, instead of the customary single bond. A printed form was desired which would not require radical changes in form or arrangement.

The instrument in question was prepared in the presence of all the parties by Capt. Mathews, a lawyer, banker and real estate operator and one of the mortgagees therein (P. R. 33, 37, 40, 41, 42). It was completed on a printed mortgage blank, marked "Mortgage without Bond" at the top and "Mortgage" on the cover. The heading and endorsement notified the parties that filling it out would produce a mortgage.

The instrument was recorded by the mortgagees as a mortgage and no objection made by them to its record as such. Afterwards, and before it became barred by the statute of limitations, it was called a mortgage by Capt. Mathews and by Mr. C. H. Syme, also a lawyer and the son of the other mortgagees therein (P. R. 58 to 60).

The instrument recites a fixed debt, promises to pay it, provides for defeasance on payment, and for a foreclosure sale on default. If that does not constitute a mortgage, what would?

Revenue Stamps

On the deed to the Copper Estate (P. R. 72 to 74), war revenue stamps to the amount of $125 were affixed. This was based on a value or consideration of $125,000 (30 Stat. L. 461, 462), being the amount of the contract price in the prior negotiations (P. R. 41). The purchase money mortgage, however, has only $46.50 in revenue stamps. If the mortgage had been intended as a sale or reconveyance, the sum of $100 in war stamps would have been affixed, because of the $100,000 in notes, instead of $46.50 in stamps, which is a very close approximate to the amount required on a mortgage (30 Stat. L. 460). No stamps were affixed to the notes because of the stamps on the mortgage (30 Stat. L. 1390). If the notes had not been secured by a mortgage, Capt. Mathews as a lawyer and bank president would also have affixed the proper stamps on the notes (30 Stat. L. 459).

From the stamping alone, it is quite evident that the parties treated the purchase money mortgage as a mortgage, and not as a reconveyance which required $100 in war stamps thereon and an addititonal $20 in stamps on the notes.

Defeasance Clause

The mortgage has the usual form of defeasance clause and and that is the plainest indication that a mortgage was meant (*27 Cyc.* 1083).

The defeasance clause alone makes the instrument a mortgage.

> *27 Cyc.* 996.
> *Scott v. Hughes,* 53 S. E. 453; 124 Ga. 1000.

The use of a printed blank containing a defeasance clause, even though that clause was not filled out, has been held sufficient to make a mortgage (*Burnett v. Wright,* 135 N. Y. 543).

Cases are readily found wherein even an informal defeasance clause has been held sufficient in itself to constitute a mortgage:

Teal v. Walker, 111 U. S. 242.
Eckford v. Berry, 87 Tex. 415; 28 S. W. 937.
Land v. May. 73 Ark. 415; 84 S. W. 489.
Poston v. Jones, 122 N. C. 536; 29 S. E. 951.
National Bank v. Tenn. Co., 62 Ohio 564; 57 N. E. 450.
Johnson v. Prosperity Ass'n, 94 Ill. App. 260, 264, 267, 268.

Whenever an instrument of conveyance states that the payment of a sum of money will defeat it, it is simply a mortgage, both in form and effect (*27 Cyc.* 996).

Existence of Debt

The negotiable promissory notes issued by the Copper Estate and aggregating $100,000 are certainly evidence of a continuing debt. The absence of such a debt would not convert the mortgage into a sale (*Russell v. Southard,* 12 How. 139, 152), but the existence of a debt is necessary to convert an apparent sale into a mortgage (*Conway v. Alexander,* 7 Cranch, 218, 237).

The mortgage recites the execution of the notes of the Copper Estate and contains an express covenant by it to "pay the *indebtedness* as hereinbefore provided." The disputed instrument was given to protect or secure the indebtedness represented by these notes. It is, therefore, nothing but a mortgage, irrespective of the understanding of the parties or some of them as to its legal effect.

Foreclosure Clause

The mortgage further states that if default be made in the payment of any part of the indebtedness, the mortgagees "shall have power to sell the premises herein described according to law." This is their only right or remedy *in rem: expressio unius est exclusio alterius.*

That power to sell "according to law" can be exercised only by a foreclosure sale; and, as Arizona had no statute detailing the method of a non-judicial foreclosure sale, the sale could be had only under a court decree in a foreclosure action.

Copper Belle Mining Co. v. Costello, 12 Ariz. 318, 325; 100 Pac. 807.

Brickell v. Batchelder, 62 Cal. 623, 629, 630.

Cormorais v. Genella, 22 Cal. 116, 124.

Shillaber v. Robinson, 97 U. S. 68, 69, 77, 78.

Grant v. Phoenix Life Insurance Co., 121 U. S. 105, 112.

Lariverre v. Rains, 112 Mich. 276, 282; 70 N. W. 583.

Condon v. Maynard, 71 Md. 601, 605; 18 Atl. 957.

In 1899, the Arizona statute contemplated that the parties would supply in detail the provisions for any contemplated non-judicial foreclosure sale (R. S. Ariz. 1887, Sec. 2359).

The provision for a foreclosure sale determines the instrument to be only a mortgage and negatives any revesting of title in the mortgagees except through such a sale.

Distinction Between Mortgage and Conditional Sale

If an absolute conveyance is given as *security* for an indebtedness, the instrument is a mortgage. In case the absolute conveyance is given in *actual payment* of an indebtedness, but with a reserved option of repurchase, then it is a sale.

When a conveyance, not intended as security or as a separate defeasance, is declared to be *operative* upon the optional payment of money, then it is executory in effect and in form a conditional sale. If a conveyance is *defeasible* or can be rendered void by the payment of money, it is a mortgage, even if the mortgagor be not personally bound therefor.

Any doubt as to whether a transaction constitutes a mortgage is always resolved in favor of its being a mortgage (*Russell v. Southard,* 12 How. 139, 151).

In the cases bringing out the distinctions between mortgages and conditional sales, the instrument is in form an absolute conveyance, with no mention of a debt, but giving an option to repurchase.

In the case at bar, there is not only a recited and continuing indebtedness, evidenced by negotiable promissory notes, but the instrument contains an express promise to pay it, provides for a *defeasance* on payment and a foreclosure on default. By all the tests, this makes the paper a mortgage (*27 Cyc.* 968).

Admissions by Mathews and Syme

In 1901, Alex. F. Matthews, one of the mortgagees, and C. H. Syme, son of the other mortgagee and attorney for both of them, presented a petition to the Interior Department (P. R. 58 to 60) stating in effect that the property had been sold to the Copper Estate and notes received for the purchase price, *secured by a mortgage.* The identity of the transaction is not denied. C. H. Syme attended the trial herein, but was not called to explain the statements.

As the best qualified parties called the paper a mortgage, their admission is of great importance (*Adams v. Hopkins,* 144 Cal. 19, 33; 77 Pac. 712); and "the doctrine of 'once a mortgage, always a mortgage,' applies to it" (*Dean v. Nelson,* 10 Wall. 158, 171).

The admission by the mortgagees in the course of ownership is admissible against the plaintiffs, their successors in title, especially as the plaintiffs are concededly in part at least trustees for the mortgagees (P. R. 45).

Baker v. Humphrey, 101 U. S. 494, 499.
Gaines v. Relf, 12 How. 472, 531.
Rush v. French, 1 Ariz. 99, 143; 25 Pac. 816.
Costello v. Graham, 9 Ariz. 257, 263; 80 Pac. 336.
16 Cyc. 986 B.

II

The mortgage created only a lien for a purchase money debt and did not operate as a conveyance or conditional sale.

Arizona Statute

In 1899, there was an Arizona statute to that effect:

> "A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale" (R. S. Ariz. 1887, Sec. 3155; see also Sec. 797).

Construction of Similar Statutes

The *identical statute* in California, Montana, Utah and Nevada, and similar statutes in Oregon, Washington, and Michigan, have been held to make every mortgage (*including a purchase money mortgage to the vendor*) a mere lien, leaving legal title and full right of possession in the mortgagor until after a foreclosure sale.

Neslin v. Wells, 104 U. S. 428, 430, 440 (purchase money mortgage).

Teal v. Walker, 111 U. S. 242, 251.

Savings Society v. Multnomah County, 160 U. S. 421, 426.

Bilger v. Nunan, 199 Fed. 549 (decided by this Court).

Couper v. Shirley, 75 Fed. 168, 170 (decided by this Court).

Union M. L. I. Co. v. Union M. P. Co., 37 Fed. 286, 291 (purchase money mortgage).

Adams v. Hopkins, 144 Cal. 19, 32; 77 Pac. 712 (purchase money mortgage).

Castro v. Adams, 153 Cal. 382; 95 Pac., 1027 (purchase money mortgage).

Kidd v. Teeple, 22 Cal. 255, 256, 262 (purchase money mortgage).

Bludworth v. Lake, 33 Cal. 255, 261, 264 (purchase money mortgage).

McMillan v. Richards, 9 Cal. 365, 410.

Nagle v. Macy, 9 Cal. 426, 428.

Reading v. Waterman, 46 Mich. 107 (purchase money mortgage).

Norfor v. Busby, 19 Wash. 540; 53 Pac. 661.

First Nat'l Bank v. Mining Co., 8 Mont. 32; 19 Pac, 403.

Orr v. Ulyatt, 23 Nev. 134; 43 Pac. 916.

Sidney Co. v. South Ogden Co., 20 Utah 267; 58 Pac. 843.

Arizona Adopted California Statute and Decisions

The Arizona statute was adopted *verbatim* from section 260 of the California Practice Act of 1851 (now section 744 of the California Code of Civil Procedure of 1906). All of the above statutes were adopted from or based upon the California statute.

Prior to the adoption by Arizona in 1887 of the California statute, the Supreme Court of California and the United States Supreme Court had decided that a mortgagor thereunder held the full legal title until foreclosure sale. In the cases of *Neslin v. Wells* (104 U. S. 428, 430, 440), *Kidd v. Teeple* (22 Cal. 255, 256, 262) and *Bludworth v. Lake* (33 Cal. 255, 261, 264) *that construction of the statute had been applied to purchase money mortgages to the original vendor.*

The construction of the statute by the California courts and by the United States Supreme Court was necessarily adopted by Arizona, as its Supreme Court has frequently decided that

when Arizona enacts a statute of another state, the prior construction of that statute by the highest court of such sister state is not only controlling on the Arizona courts but is a part of the Arizona statute.

Murphy v. Brown, 12 Ariz. 268, 276; 100 Pac. 801.
Territory v. Copper Queen Co., 13 Ariz. 198, 215; 108 Pac. 960.
Territory v. Delinquent Tax List, 3 Ariz. 117; 21 Pac. 768.
Cheda v. Skinner, 6 Ariz. 196; 57 Pac. 64.
Goldman v. Sotelo, 8 Ariz. 85; 68 Pac. 558.
Elias v. Territory, 9 Ariz. 1; 71 Pac., 605.
Santa Cruz County v. Barnes, 9 Ariz. 42; 76 Pac. 621.
Costello v. Mulheim, 9 Ariz. 422; 84 Pac. 906.

Contractual Effect of Statute

The Arizona statute was also a contractual part of the mortgage (*Hooker v. Burr,* 194 U. S. 415, 420), as a mortgage is construed and given effect according to the laws of the State where the land is situated (*Brine v. Ins. Co.,* 96 U. S. 627, 636; *Hendey v. Townsend,* 109 U. S. 665; *20 Cyc.* 975).

Arizona Lien Theory Decisions

The lien theory of a mortgage is followed in Arizona. Its Supreme Court has held that a mortgagor retains legal title. It has also repeatedly applied the limitation statutes to mortgage foreclosures when the debt was barred.

Bennett v. U. S. Land Co., 16 Ariz. 138, 144, 145; 141 Pac. 717.
Holmes v. Bennett, 14 Ariz. 298, 300; 127 Pac. 753.
Provident Ass'n v. Schwertner, 15 Ariz. 517, 518; 140 Pac. 495.
Schwertner v. Provident Ass'n, 17 Ariz. unreported; 148 Pac. 910.

In the Holmes case, at page 301, the Supreme Court of Arizona said that a trustee under a resulting trust for a purchaser of the mortgaged premises, long after default in the debt, had the naked *legal title* to the land; in that case it was only the naked title because of the trust between the trustee and the purchaser.

General Authorities for Lien Theory

Even independent of any statute, the rule in all of the States west of the Mississippi River (except to a limited extent in Arkansas), and in a great majority of the other States, is that every mortgage (including a purchase money mortgage), both before and after default, is a mere lien or security, passing no title or estate to the mortgagee, and giving him no right or claim to the possession of the property, except through an actual foreclosure sale. That is the "modern common law doctrine and the one generally accepted in this country."

1 Jones on Mortgage (6th Ed.), Sec. 59.
Stearns Rogers Co. v. Aztec Co., 14 N. M. 300, 308 to end; 93 Pac. 706, 712 to 714.
27 Cyc. 961 to 963.
1913 Cyc. Ann. 2394.
Myer v. Car Co., 102 U. S. 1, 10.
Cross v. Allen, 141 U. S. 528, 537.
Jackson v. Johnson, 248 Mo. 680, 684, 698, 702; 154 S. W. 759.
U. S. v. Commonwealth Trust Co., 193 U. S. 651, 655, 656.

It was and is also the Civil Law of Spain and Mexico.

Coles v. Perry, 7 Tex. 109.
Royal Ins. Co. v. Miller, 199 U. S. 353, 361.

Trust Deeds

> "A deed of trust of real estate, executed for the purpose of securing a debt, conditioned to be void upon payment of the debt, and containing a power of sale on default, is essentially a mortgage, and does not differ in its legal operation and effect, from an ordinary mortgage with power of sale. Like a mortgage, such a deed is a mere security for a debt, or for the performance of certain undertakings by the grantor. It is a mere incident to the debt which it secures, upon which it depends, and which it follows, and will pass with an assignment of the debt to the holder."

27 Cyc. 967.
Stearns Rogers Co. v. Aztec Co., 14 N. M. 300, 328; 93 Pac. 706, 712.
Platt v. Union Pac. R. R. Co., 99 U. S. 48, 57.
Sidney Co. v. South Ogden Co., 58 Pac. 843; 20 Utah 267, under statute identical with R. S. Ariz. 1887, Sec. 3155.

Messrs. Mathews and Syme were both declared to be creditors in the mortgage. As no one can be a trustee for himself, the transaction is an ordinary mortgage, as the trustees owned part of the debt secured by the instrument.

28 A. & E. Ency. Law (2nd Ed.) 764.
2 Jones on Mortgages, 730, 731.
Banta v. Wise, 135 Cal. 277, 280; 67 Pac. 129, 130.

A trust deed in the nature of a mortgage is one that is given as security for a debt; a deed of trust for the benefit of creditors generally or other beneficiaries is governed by the local rules as to express trusts.

Effect of Purchase Money Mortgage

Even though the instrument to Messrs. Mathews and Syme was given simultaneously with the deed for all or most of the purchase money, it is not a conditional sale, but a simple mortgage, passing no title to the mortgagee.

Adams v. Hopkins, 144 Cal. 19, 32; 77 Pac. 712, 717.
Castro v. Adams, 153 Cal. 382; 95 Pac. 1027.
Bludworth v. Lake, 33 Cal. 255, 261, 264.
Kidd v. Teeple, 22 Cal. 255.
Ferguson v. Miller, 4 Cal. 97.
Dean v. Nelson, 10 Wall. 158, 171.
Anderson v. Baxter, 4 Ore. 105, 108, 110.
Becker v. McCrea, 193 N. Y. 423; 86 N. E. 1122.
Barson v. Mulligan, 191 N. Y. 306; 84 N. E. 75.
Stearns Rogers Co. v. Aztec Co. 14 N. M. 300, 312, 326 to end; 93 Pac. 706.
Jackson v. Johnson, 248 Mo. 680, 684, 698, 702; 154 S. W., 759.
R. S. Ariz. 1887 Sec. 3155 (quoted in full *supra*).

The Arizona statute above cited is absolutely decisive that "a mortgage of real property, whatever its terms, shall not be deemed a conveyance." This necessarily includes a purchase money mortgage; and, as before stated, the California Courts and the United States Supreme Court so construed such a statute both before and after its adoption by Arizona.

Right of Possession

Neither the mortgagees nor their assigns had any right to take possession of the land until after foreclosure sale; even if the mortgagees did take possession before foreclosure sale, they are in no better position than if out of possession.

R. S. Ariz. 1887, Sec. 3155 (quoted in full *supra*).
Teal v. Walker, 111 U. S. 242, 251.

Russell v. Ely, 2 Black (U. S.) 575.

Couper v. Shirley, 75 Fed. 168, 170 (decided by this court).

Anderson v. Baxter, 4 Ore. 105.

Nagle v. Macy, 9 Cal. 426, 428.

Ferguson v. Miller, 4 Cal. 97.

Kidd v. Teeple, 22 Cal. 255, 262.

Barson v. Mulligan, 191 N. Y. 306, 313, 314, 316; 84 N. E. 75.

Becker v. McCrea, 193 N. Y. 423, 426, 427; 86 N. E. 1122.

Construing Papers Together

For some purposes, a deed and an accompanying purchase money mortgage are said to be indivisible and are construed together. This is done to cut off intervening liens or estates, to describe the property, or to protect the grantor against an incompetent mortgagor; but not to change the legal effect of either paper.

In the famous case of *Adams v. Hopkins* (144 Cal. 19, 32, 33; 77 Pac. 712, 717), followed and approved in *Castro v. Adams,* (153 Cal. 382; 95 Pac. 1027), where an unsuccessful attempt was made to treat a deed and concurrent purchase money mortgage as a conditional sale, the California Supreme Court, sitting *en banc,* said:

> "The two documents (deed and purchase money mortgage) are, indeed, to be construed together as one contract. But this does not alter the manifest effect of either; and, though the words of conveyance be the same in both documents, yet in the one they are to be construed as passing title, in the other as merely mortgaging the land."

The deed and mortgage are not to be "joined together";

neither loses its separate identity or legal effect (see *Bank v. Flath,* 86 N. W. 867; 10 N. D. 281).

Improbability of Conditional Sale

What was the purpose of the simultaneous deed to the Copper Estate (P. R. 72 to 74), if it was not to convey to it the legal title, and then take back a purchase money mortgage? If the parties had intended a conditional sale, Capt. Mathews would have prepared the executory contract of sale which he originally wished to give (P. R. 32), instead of a deed, notes and a purchase money mortgage.

Nevertheless, the appellees ask this Court to rule that a conditional sale was consummated by the Copper Estate, first acting in form as absolute grantee and then as conditional vendor, but in reality as conditional vendee; and by Mathews and Syme, first appearing in form as absolute grantors and then as conditional vendees, but in reality being only conditional vendors.

The Copper Estate refused to take another option (P. R. 32), after having already had one (P. R. 41); after its experience with Col. Syme in the option transaction, it is clear why Senator Dorsey "wanted a deed" (P. R. 32) and that no conditional sale was intended.

Analogous Cases

In *Dean v. Nelson,* 10 Wall. 158, 171, a purchase money mortgage was given to the vendor with an obligation, payable only out of profits, for the *entire purchase price* of property. It was contended that the instrument *according to its spirit* was a conditional sale, and that in view of the circumstances under which it was given, it would be a hardship to treat it as a mortgage; but the Court decided that it was nothing but a mortgage and said:

"Was it a conditional sale, or was it a mortgage?

> On this question hardly a doubt can be raised. The Court is asked by the appellant, under the circumstances of the case, which the appellant asserts to have been unconscionable on Nelson's part, to consider the instrument as a conditional conveyance of the stock, and not a mortgage. But the Court has no power over the transaction to make it other than, or different from, what the parties themselves made it. If it is a mortgage, it is the duty of the Court to declare it a mortgage; and if it is a mortgage it has, perforce, all the incidents and privileges of a mortgage; and that it is a mortgage there is no room for question."

In *Ferguson v. Miller,* 4 Cal. 97, a defeasible deed was given for the *entire purchase price.* The mortgagee after default took possession of the property, and the mortgagor abandoned it. Subsequently the property greatly increased in value and the mortgagor quitclaimed to a purchaser during the pendency of the action. An attempt was made to prove the transaction a conditional sale and the mortgagor gave testimony tending to sustain that contention. The lower Court held the transaction to be a conditional sale. Mr. Justice Field, then at the bar, argued for the respondent that the intention should govern; that Section 260 of the California Practice Act of 1851 (adopted later by Arizona as Sec. 3155 of its Code of 1887) did not apply because enacted after the transaction; that the words "mortgage" or "security" did not appear in the paper; and that there was no loan of money or security intended. The Appellate Court brusquely reversed the Court below, saying that the error "was too palpable for discussion"; and that the paper was so distinctly a mortgage that it could not be called by any other name. Shortly thereafter Mr. Justice Field, in two famous decisions (*McMillan v. Richards,* 9 Cal. 365; *Nagle v. Macy,* 9 Cal. 426), defi-

nitely established in the Western states the lien theory of a mortgage under the California statute, as well as under the modern rules of law.

In *Adams v. Hopkins* (144 Cal. 19, 32; 77 Pac. 712, 717), a *conditional* obligation was given for the *entire purchase money* and the Court *en banc* held that the accompanying concurrent defeasible conveyance to the original vendor was an ordinary mortgage and not a conditional sale.

In *Castro v. Adams* (153 Cal. 382; 95 Pac. 1027), the last named case was followed and approved, even against the original mortgagee; and the plea of the statute of limitations was sustained for the entire purchase price of a Mexican Grant which at the time of the transaction had been in course of confirmation and for which a patent had only recently been issued.

In *Anderson v. Baxter,* 4 Ore. 105, a purchase money mortgagor had abandoned the property for a long time and had given no personal obligation with the mortgage; his grantee successfully pleaded the statute of limitations.

Becker v. McCrea (193 N. Y. 423; 86 N. E. 1122), and *Barson v. Mulligan* (191 N. Y. 306; 84 N. E. 75) are also interesting cases and show that purchase money mortgages are as to legal effect the same as other mortgages, notwithstanding any supposed harshness in applying the rule.

Appellees' Cases

In the Court below, counsel for the appellees relied chiefly on Texas cases to support their claim that the deed and purchase money mortgage constitute on their face a conditional sale.

Although in Texas a loan mortgage is only a lien or security, there is an extraordinary distinction recognized there in the case of purchase money mortgages, executed to the vendor simultaneously with the deed to the mortgagor. Fol-

lowing the leading Texas case of *Dunlap v. Wright,* 11 Texas, 597, the Texas courts, without question for many years, held that a deed and a simultaneous purchase money mortgage to the vendor constitute one instrument and leave the legal title in the mortgagee until payment.

In recent cases, however, the Texas courts seem to appreciate their isolation in maintaining that proposition and have questioned its soundness, so far as allowing the mortgagee to rescind the transaction; and

> "the tendency of the late decisions seems to point to the ultimate abandonment of the rule in its full vigor, or at least to a modification thereof."
>
> *McCamly v. Waterhouse,* 80 Tex. 340, 342, 343; 16 S. W. 19.
>
> *Stitzle v. Evans,* 74 Tex. 596, 598; 12 S. W. 326.
>
> *Ins. Co. v. Ricker,* 10 Tex. C. A. 264, 266, 267; 31 S. W. 248 and cases cited.

This right of rescission in Texas is personal to the vendor (*Ins. Co. v. Ricker,* 10 Tex. C. A. 264, 267; 31 S. W. 248). A purchaser of vendor's lien or purchase money mortgage notes is not entitled to rescission but only to a decree of foreclosure; and part payment destroys the right of rescission.

> *Dupree v. Mansur,* 214 U. S. 161, 166, decided with reference to a Texas transaction.
>
> *McCamly v. Waterhouse,* 80 Tex. 340, 343; 16 S. W. 19.
>
> *Ins. Co. v. Ricker,* 10 Tex. C. A., 264, 267; 31 S. W. 248.

In the case at bar nearly one-half of the notes secured by the mortgage were issued to others than the vendors, carrying therewith an equivalent interest in the security; and an adjustment in the notes was also made because of the distribu-

tion of the $5,000 cash (P. R. 43). Furthermore, the appellees are the owners and holders by some transfer of three-quarters of the notes (P. R. 9, 60). They have not returned nor offered to return the $5,000 paid for the deed—an indispensable prerequisite to any rescission. It is clear, therefore, that even in Texas, the appellees would not be entitled to the *rescission* which in effect they ask herein, with reference to a transaction of their predecessors in title.

The best explanation of the Texas rule is that it is the result of the extraordinary application and use in that state of the vendor's lien on realty for unpaid purchase money. *The doctrine of vendor's lien is not recognized at all in Arizona* (*Baker v. Fleming,* 6 Ariz. 418; 59 Pac. 101); *and the United States courts are bound by the Arizona rule* (*Dupree v. Mansur,* 214 U. S. 161, 167; *39 Cyc.* 1800).

The early New York cases to the effect that a purchase money mortgage conveys the legal title have been overruled in New York for nearly a century (*Becker v. McCrea,* 193 N. Y. 423; 86 N. E. 1122; where it was held that the heirs of the original purchase money mortgagee who had taken possession did not have title even by adverse possession).

Counsel for the appellees can of course cite a few Eastern cases to the effect that in form or substance a mortgage conveys the legal title. None of the Western states has adopted that doctrine and most of the Eastern states have overruled it (*Jones on Mortgages,* 6th Ed. Sec. 59).

Conclusion

The instrument from the Copper Estate to Mathews and Syme is unquestionably only a mortgage. Under the deed from Messrs. Mathews and Syme, the Copper Estate acquired a legal title, subject only to the lien of the mortgage; and at the time of the commencement of this action, the Copper Estate still had the legal title.

It follows, therefore, that the first, second, fifth and sixth assignments of error should be sustained.

III

Parol evidence was not admissible to show the intended or expected legal effect of the mortgage and cannot be considered by the Court, even if received without objection.

As the instrument from the Copper Estate to Mathews and Syme is on its face a mortgage, we contend that parol or extrinsic written evidence was not admissible to vary its terms or legal effect. Even if such evidence was received without objection, the authorities uniformly hold that the Court is not permitted to consider it. At any rate the Court below ignored that testimony in the combined findings and decree.

We further contend that all the evidence in the case proves that nothing but a purchase money mortgage was intended.

Parol or Extrinsic Evidence Inadmissible

Parol evidence is, of course, admissible in all cases to prove that a *deed* absolute on its face is in fact a mortgage; but *parol or extrinsic written evidence is not admissible to contradict the terms or legal effect of a mortgage.*

The distinction is entirely logical and not arbitrary. An absolute deed is often demanded as security in a futile endeavor to avoid the necessity of foreclosing a mortgage; but even the most ignorant would not take a mortgage where an absolute conveyance was intended.

> "Mortgages and deeds of trust are within the protection of the rule under discussion, and the terms and

legal effect of such instruments cannot be added to, varied, controlled or contradicted by parol or other extrinsic evidence. Thus it cannot be shown that a transaction evidenced by a written instrument which clearly appears on its face to be a mortgage was intended by the parties to be a conditional sale, an absolute conveyance or an assignment. It is also inadmissible to introduce parol evidence denying the personal liability of the mortgagor."

17 Cyc. 626.
1913 Cyc. Ann. 2022.
1914 Cyc. Ann. 318.
27 Cyc. 1023.
Jones on Evidence, Sec. 499.
Devlin on Deeds (3rd Ed.) Sec. 1144.
Eckford v. Berry, 87 Tex. 415; 28 S. W. 937.

"Parol evidence will not be received for the purpose of showing that the parties intended that a transaction evidenced by writings having the characteristics of a mortgage should constitute a sale, the maxim 'Once a mortgage, always a mortgage' applying."

20 A. & E. Ency. Law (2nd Ed.) p. 951.

The legal import of a paper, if clear, definite and complete, cannot be varied by parol or other extrinsic evidence.

21 A. & E. Ency. Law (2nd Ed.) 1084.
17 Cyc. 570.
U. S. v. F. & D. Co., 152 Fed. 596.

"The legal effect of a written contract, though not stated in terms in the writing itself, but left to be implied by law, can no more be contradicted, changed or explained by extrinsic evidence than if the legal implied effect had been expressed in the written terms."

(*Smith Co. v. Corbin*, 142 Pac. 1163, 1165—Wash., 1914.)

Lack of Objection Immaterial

The Courts reject parol or extrinsic written evidence to vary the terms or legal effect of a writing or to show the intent or meaning of the parties, not simply as a rule of evidence but essentially as a doctrine of substantive law. A Court is forbidden to heed such evidence, even though it was received without objection, as the law treats such evidence as immaterial.

Pitcairn v. Phillip Hiss Co., 125 Fed. 110, 113, 114.
Wigmore on Evidence, Sec. 2400.
1 Greenleaf on Evidence (16th Ed.) Sec. 350a.
Thayer on Evidence, p. 390 *et seq.*
21 A. & E. Ency. Law (2nd Ed.) 1079.
17 Cyc., 570.
Stanton v. Granger; 125 App. Div. (N. Y.) 174; 179 N. Y. Supp. 134.
Gadden v. Inst., 80 Atl. 415, 419; 33 R. I. 177.

Appellees' Cases

In the Court below, counsel for the appellees relied chiefly on *Conway v. Alexander* (7 Cranch, 218), as authority for their offer of parol evidence to show that the instrument at bar was intended as a conditional sale.

In the Conway case, the instrument was not a mortgage in form. It was a conveyance wherein Alexander for £800 conveyed a tract of land to Lyles absolutely, and another tract to trustees, who, if Alexander paid them £700 with interest prior to a certain date, were to reconvey their tract to him, otherwise to Lyles. As distinguished from the case at bar, there was no debt or evidence of one, no covenant to make the payment, no defeasance clause, and no provision for a

foreclosure sale on default. As the paper was not in form a mortgage, evidence was of course admissible to show that it was intended as one; and the action was brought by the grantor's heirs to have the conveyance declared to be a mortgage. There are self-evident distinctions between the Conway case and the case at bar.

IV

There is neither allegation, proof nor finding of mistake.

The Bill does not allege mistake nor does the decree find it. No reformation of the instrument is sought. The appellees in any event would have no right to such relief as it would be personal to their grantors and would not pass by a conveyance of the property (*Morris v. Colorado Co.*, 43 Pac. 1024; 22 Colo. 162; and cases cited). Besides, such relief has long been barred by limitation and laches.

The Bill and the decree simply endeavor to fasten a new legal effect upon a mortgage and to have it declared an absolute reconveyance.

Mistake of Law

Assuming mistake to have been alleged, proved and found, the mistake would only be one of law, by an experienced real estate lawyer, as to the legal effect of filling out a printed mortgage blank.

> "The rule admitting parol evidence in case a written instrument through mistake does not correctly express the intention of the parties applies only in cases of mistake of *fact* and not where a party has contracted under a mistake of *law*. In order to render parol evidence admissible to contradict the terms of a writing

on the grounds of mistake, it must clearly appear that such mistake was *mutual.*"

17 Cyc. 705.
Utermehle v. Norment, 197 U. S. 40, 55, 56.
Upton v. Tribilcock, 91 U. S., 45, 50.
Laver v. Dennett, 109 U. S. 90.
Hunt v. Rousmanier, 1 Pet. 1, 15 (where the mistake was as to the nature of the security).

Quantum of Proof

Mistake must be proved by evidence that is "clear, unequivocal and convincing."

Maxwell Land Grant Case, 121 U. S. 325.
U. S. v. San Jacinto Tin Co., 125 U. S. 273, 300.
U. S. v. Budd, 144 U. S., 154, 161.
R. I. v. Mass., 15 Pet. 233, 271.

Conclusion

Capt. Mathews, who drew the mortgage, knew from his legal and business experience what it meant, and certainly had no "mistake" as to what it was (P. R., p. 59).

V

Analysis of Evidence.

Lay Testimony Without Value

Where a mortgage is to be construed, the testimony of lay parties is peculiarly without value, as the legal effect of the mortgage is implied by law and is seldom clearly expressed in the instrument.

No lawyer would be heard to say, after he had filled out a mortgage blank in the customary way, that he did not intend to create a mortgage. Capt. Mathews, one of the mortgagees and the only one of them who knew just what the

effect of the mortgage would be, drew the instrument; and the conclusive presumption is that he expressed the intention of Col. Syme and himself.

Every person of ordinary intelligence understands the general legal effect of a deed, note or lease. Only lawyers and the experienced of laymen understand the legal effect of a mortgage.

To the inexperienced layman, a mortgage means just what it is in form: a conveyance which can be defeated by the punctual payment of money, but which apparently becomes absolute on default.

The lay version of a purchase money mortgage transaction can be expressed in the mortgagor's usual statement: "If I pay the mortgage, I shall own the property; if I do not, I shall lose it." The necessity of foreclosure sale, implied by law into the wording of a mortgage, is something which must be learned and cannot ordinarily be found in the mortgage itself. The law does not even permit a mortgagor to contract in the mortgage transaction against his right of redemption.

Few laymen understand that if a foreclosure sale does not bring the amount of the debt, interest and expenses, the maker of the note or bond secured by the mortgage must ordinarily pay the difference. In some States a deficiency judgment is not allowed, and a mortgagee cancels the debt if he takes the property at the sale.

Col. Syme's Testimony

Col. Syme, seventy-seven years of age and an interested witness, had a confused recollection of what he had been told by Capt. Matthews fifteen years prior thereto, as to how and when the mortgagees would get back their property on default of the notes. As a matter of fact, Col. Syme stated that the mortgage itself expresses the transaction as he under-

stood it and he pointed to the defeasance clause to prove automatic revestiture of title in the mortgagees. His construction of the defeasance clause is responsible for his testimony. Even he recognized that at least before the default in the notes, the Copper Estate had some title; this is the only reasonable explanation for his remarkable dissertation as to the "control" of the property (P. R., 48, 49).

Dorsey Statement

Senator Dorsey, after the lapse of fifteen years, repeated the defeasance clause practically *verbatim* in his statement and he, too, had a confused idea of its legal effect. Calling him to explain his statement was unnecessary and might have opened the door to all parol evidence. We discuss the Dorsey statement on pages 6 and 7 herein.

Understanding of Capt. Mathews

Undoubtedly Capt. Matthews said that if the notes were not paid, he and Col. Syme would get back the property. As an experienced lawyer, he knew that could be accomplished only by foreclosure. The supposition of any inexperienced layman is immaterial.

Any ignorance of the two lay parties as to the law of foreclosure, or their understanding or misunderstanding of the legal effect of the papers or the procedure necessary to accomplish it, cannot override the instrument prepared by the most qualified of the parties, who had the largest personal interest and the greatest incentive to make the papers accurate. The legal effect of a mortgage is implied by law and rigidly enforced, even against a contrary understanding or a concurrent contract against it.

In 1901, before the bar of the statute of limitations put a premium on confused lay recollections, Capt. Mathews and C. H. Syme, both lawyers, called the instrument a mortgage.

Unquestionably that was then the understanding of the mortgagees; and that would still be the understanding of their counsel, except for the exigencies of this case.

Best Evidence

The best evidence of what was intended is the mortgage itself, prepared by the best qualified of the parties, and there is no ambiguity in its silent testimony.

VI

All relief to plaintiffs is barred by limitations and laches.

It is conceded that nothing was ever paid on the mortgage or the notes nor any action brought therein. The mortgagees "ignored the paper entirely" (P. R. 47).

We contend that since July 16, 1906, even before the appellees became interested as attorneys or trustees, the mortgage and the debt secured thereby have been barred by the Arizona statutes of limitation and the laches of the mortgagees.

Running of Limitation Statutes

Full legal title to the tract at bar, specifically located in 1863 by the description set out in the decree herein, passed from the United States on April 9, 1864 (*Lane v. Watts,* 234 U. S. 525; 235 U. S. 17). The technical right of possession against the United States did not accrue until the filing in December, 1914, of the plot of survey; but this has no bearing upon the statutes of limitation for a non-possessory action such as foreclosure (*Castro v. Adams,* 153 Cal. 382; 95 Pac. 1027).

Arizona Limitation Rule Followed

The Arizona limitation statutes and decisions are controlling

on this Federal Equity Court in mortgage foreclosures, especially as the sole ground of its jurisdiction thereover is diversity of citizenship, concurrent with that of law on the notes.

Dupree v. Mansur, 214 U. S. 161, 167.
Elwell v. Daggs, 108 U. S. 143, 147.
Lewis v. Marshall, 5 Pet. 470.
Baker v. Cummings, 169 U. S. 189, 206, 208, 209.
Godden v. Kimmel, 99 U. S. 201, 210.
Teall v. Schroder, 158 U. S. 172, 178, 179.
O'Brien v. Wheelock, 184 U. S. 450, 493.
Curtney v. U. S. 149 U. S. 662, 674, 675.
Willard v. Woods, 164 U. S. 502, 520.
Bauserman v. Blunt, 147 U. S. 647.

Arizona Foreclosure Limitation

The laws of the state where the action is tried govern on the question of limitation (*Union Pac. R. R. Co. v. Wyler,* 158 U. S. 285, 289).

The Arizona Supreme Court has held that under R. S. Ariz. 1887, Secs. 2310, 2314 (both as amended by L. 1891 p. 74), 2316 and 2327, the pertinent foreclosure limitation (as the mortgage and the notes were not executed in Arizona) was five years from the maturity of the notes; and that under R. S. Ariz. 1901, Secs. 2954, 2956 and 2874, the time was four years, but claims against which the statute had started to run retained the limitation time of the former statute.

Holmes v. Bennett, 14 Ariz. 298, 300; 127 Pac. 753.
Provident Ass'n v. Schwertner, 15 Ariz. 517, 518; 140 Pac. 495.
Schwertner v. Provident Ass'n, 17 Ariz. unreported; 148 Pac. 910.

"A court of equity is equally bound with a court of

law by the statutes of limitation" (*Fleming v. Black Warrior Copper Co.,* 15 Ariz. 1, 8).

These constructions by the Arizona Supreme Court of the statutes of limitation of that state are binding on United States courts (*Bauserman v. Blunt,* 147 U. S. 647).

The Copper Estate is an Arizona corporation and is a "person" within the meaning of the limitation acts (R. S. Ariz. 1887, Sec. 2932, subd. 3).

Applicability to Purchase Money Debts

The statute of limitation can be set up against a purchase money debt.

Dupree v. Mansur, 214 U. S. 161, 166, 167
Castro v. Adams, 153 Cal. 382; 95 Pac. 1027.
Anderson v. Baxter, 4 Ore. 105.

There is nothing discreditable in the plea (*Dupree v. Mansur, supra,* p. 167; *Wood v. Carpenter,* 101 U. S. 135, 139; *19 A. & E. Ency. Law* (2nd Ed.) 151, 152); and the language of the statute must prevail (*Amy v. Watertown,* 130 U. S. 320, 324).

When a mortgage is only a security for a debt, it is barred when the debt is barred, in the absence of a contrary statute.

Dupree v. Mansur, 214 U. S. 161, 167.
Elwell v. Daggs, 108 U. S., 143.
Cleveland Ins. Co. v. Reed, Fed Cases 2889.
Holmes v. Bennett, 14 Ariz. 298, 300; 127 Pac. 753.
Provident Ass'n v. Schwertner, 15 Ariz. 517, 518.
Schwertner v. Provident Ass'n, 17 Ariz. unreported; 148 Pac. 910.
Blackwell v. Barnett, 52 Texas 326.

Grantee May Plead Limitation

The grantee of the Copper Estate, whose deed was not made

subject to the mortgage, also has the benefit of the limitation statutes.

Sanger v. Nightingale, 122 U. S. 176, 184.
Elwell v. Daggs, 108 U. S. 143, 147, 148.
19 A. & E. Ency. Law (2nd Ed.) 184.

Laches

Laches alone bars the appellees' claim. This action was commenced about fifteen years after the mortgage was given, and about thirteen years after the last note matured.

An action may be barred by laches even before it would be barred by limitation and the laches period is never longer than the time in the limitation statute.

Hayward v. National Bank, 96 U. S. 611, 617
Martin v. Gray, 142 U. S. 236, 239.
Metropolitan Bank v. St. Louis Dispatch Co., 149 U. S. 436, 444, 450.
O'Brien v. Wheelock, 184 U. S. 450, 493.
Patterson v. Hewitt, 195 U. S. 309.
Alsop v. Riker, 155 U. S. 448, 460.
Castro v. Adams, 153 Cal. 382; 95 Pac. 1027.

The mortgagees did not care to go to the trouble and expense of foreclosing their mortgage, although from time to time they had various sets of attorneys (P. R. 42, 43, 45); they "ignored the paper entirely" (P. R. 47).

The appellees themselves did not acquire any interest until over a year after the mortgage and notes were barred by limitation.

Relief for Mistake Barred

There is neither allegation, proof nor finding of mistake. Any "mistake" would only be one of law by an experienced lawyer as to the legal effect of a mortgage. This we discuss in Point IV.

At any rate, the bar of the statutes of limitation as to mistake was pleaded, and they have long since barred any relief for mistake.

Conclusion

The form of this action and the contention of a conditional sale constitute a practical recognition of the bar of the statutes of limitation. If those statutes were not involved, we believe that the appellees would have started a foreclosure action instead of an action to declare a conditional sale.

VII

There was no power of extra-judicial sale nor any attempt to exercise such a power.

In the Court below, counsel for the appellees argued only that the two instruments of August 3, 1899, constitute a conditional sale; and that if the two documents were of themselves insufficient for such a determination, parol evidence was admissible to prove a conditional sale, because of supposed ambiguity in the mortgage. We believe that we have fully answered both of these contentions and that the decree should be reversed and the Bill dismissed on the merits.

No Sale Nor Power of Sale

Before the trial, counsel for the appellees, in the second amendment to the Bill (P. R. 17, 18), contended that there had been a foreclosure of the mortgage because of the deed to the appellees; but no such contention was made on the trial or the argument in the Court below.

Under the heading "Foreclosure Clause" on pages 13 and 14 herein, we have demonstrated that there was no power

conferred by the mortgage to sell in any way than under a decree in a foreclosure action.

The testimony of Col. Syme proves that there was no attempt to exercise any supposed power of sale, because he testified that the mortgagees made no attempt to sell the property and "ignored the paper entirely" (P. R. 47). Counsel for the appellees also conceded that there had been no sale on notice or advertisement or by action (P. R. 61).

At any rate, as the appellees are trustees (at least to a substantial extent) for their grantors, the surviving mortgagee and the representatives of the deceased mortgagee (P. R. 45, 60), any alleged sale to the appellees is absolutely void, as a private conveyance from trustees to themselves (*Perry on Trusts,* 5th Ed. Secs. 602v and 602w). A trustee cannot directly or indirectly be both grantor and grantee of the trust estate.

Foreclosure in Arizona can now be had only by action in equity, even under power of sale mortgages executed prior to the codification of 1913 (*Schwertner v. Provident Ass'n,* 17 Ariz. unreported; 148 Pac. 910).

VIII

Neither Mrs. Mathews nor Mrs. Syme had community rights.

The contention that Mrs. Mathews and Mrs. Syme had community rights, which survived the conveyance of August 3, 1899, has been abandoned (P. R. 47). Counsel for the appellees recognized that there were no community rights, as the husbands were born and married and always resided in jurisdictions where the dower system prevailed. This rule

has been sustained by the courts of California, Washington, Texas, Louisiana, New Mexico, Idaho, Alabama and by the United States Supreme Court. The only contrary case, *Heidenheimer v. Loring* (26 S. W. 99; 6 Tex. C. A. 568), was directed overruled by *Thayer v. Clarke* (77 S. W. 1050, affirmed in 81 S. W. 1274) and by many other Texas cases.

IX

The appellant was properly incorporated and its corporate existence cannot be attacked by the appellees.

The Copper Estate was duly incorporated in 1899. No filing of the Articles of Incorporation was then required in any territorial office. At any rate the lawfulness of the incorporation or the present corporate existence can only be assailed in a direct action by the state of Arizona (*10 Cyc. 223; Wells Co. v. Gastonia,* 198 U. S. 177).

In both the deed and the mortgage the Copper Estate was described as a corporation, and Messrs. Mathews and Syme took a mortgage and notes from it executed in its corporate name and under its corporate seal. They and their successors in interest are, therefore, absolutely estopped from denying the existence of the corporation for the purpose of litigation over the instruments.

10 Cyc. 245, 246.
Agua Co. v. Bashford Co., 4 Ariz. 203.
Andes v. Ely, 158 U. S. 312, 322.
Chubb v. Upton, 95 U. S. 665.
Tulare District v. Shepard, 185 U. S. 1.
2 Cook on Corporations (7th Ed.) Sec. 637.

The record shows not only a proper incorporation (P. R.

57, 58) but also an organization of the corporation (P. R. 49 to 51). It held a title for over fifteen years to a tract of Arizona land. That in itself is a continuous user of the corporate franchise (*10 Cyc.* 1282; 1913 Cyc. Ann. 1175).

The decree should be reversed and the bill dismissed on the merits, with costs.

Respectfully submitted,

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Additional authorities cited by F. J. Butler in his oral argument, and inserted by permission of the Court.

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A written contract operates in the absence of fraud or mistake the final conclusion reached, and prior and contemporaneous verbal discussion or written memoranda are assumed to be either rejected or merged in it.

Goldenberg v. Taglino, [illegible] 686
In re Hewens Estate, 14[illegible] 101
Vance v. Allison et al, [illegible] 775
Swift v. Moore, [illegible] 614

The intention of the parties to a deed must be gathered from its four corners.

Garrett v. Gillis, 161 [illegible] 624
Yeager v. Farnsworth, 145 [illegible] 97
Bridgewater etc. vs. Fredericksburg Power Co. [illegible] 17[illegible]
Pendrey v. Godwin, 96 So. 42

"To sell according to law" means to sell at public outcry by virtue of an execution issued on a judgment of foreclosure.

Brickell v. Batchelder, 62 Cal. [illegible]
Hall v. Jannann, 161 Cal. 614
Copper Belle Min. Co. v. Costello, [illegible] Ariz. 318

Words in a contract are to be construed against the party using them if there is any ambiguity.

Garrison v. U. S., 7 Wall. 688

Courts of equity will not assist parties when their condition is attributable to a failure to exercise ordinary care for their own protection. Especially is this so where the parties prepare their own contract and one of them is a lawyer conversant with legal contracts and their effect.

Great Western Mfg. Co. v. Adams, 17[illegible] Fed. [illegible]

In Appellees' main brief, at page [illegible], the statement is made that a mortgagor's assignee cannot quiet title against a mortgagee in possession without paying the debt, and Ruggio v. Palmtag 166 Cal. 707 is cited. In Faxon v. All Persons, 166 Cal. 7[illegible], the court in banc held that a mortgagor's assignee who had not assumed or agreed to pay the debt could quiet title without paying the mortgage; and Cahn v. Hibernia Society, 166 Cal. 76[illegible], is to the same effect. In the Faxon case, the Ruggio case is discussed and distinguished. But appellant herein does not seek to quiet title; it only asks for a dismissal of the bill.